PT Jabbaru International v Pauline Sagau & Assoc & Ors

HIGH COURT (LABUAN) — WRIT NO LBN-22NCVC-4–12 OF 2022
AMELATI PARNELL JC
14 DECEMBER 2023

Civil Procedure — Striking out — Writ and statement of claim — Whether plaintiff's action was not suitable for striking out — Whether question whether plaintiff's claim was time-barred or that individual defendants named in title of suit were partners of first defendant at material time were matters that had to be determined at full trial — Whether failure of plaintiff's writ to contain teste in name of the Chief Judge of Sabah and Sarawak as per Form 2 in Rules of Court 2012 was a curable defect and did not render the writ a nullity

The plaintiff ('P'), a company incorporated in Indonesia, had purportedly entered into an escrow agreement with the first defendant ('D1') pursuant to which P had purportedly deposited USD400,000 into an escrow account opened by D1 for the purpose of paying out the funds to a beneficiary named in the escrow agreement. P contended that when the transaction for the purpose of which the escrow account was created was aborted, it sought for the return of the USD400,000 but D1 failed to refund the same despite a legal demand for the same having been made. In the instant action for recovery of the said sum, P contended that the second to the fifth defendants were at all material times partners of D1. The fourth and fifth defendants ('the defendants'), who denied P's allegations, applied to strike out P's action on the ground that the cause of action was for a purported breach of contract and therefore was time-barred under the Limitation Act 1953 ('the LA'). P, however, contended that no time-bar applied as its claim was for recovery of trust monies under s 22 of the LA, a contention the defendants refuted by arguing that P had not pleaded a cause of action in trust. The defendants also argued that P's writ was defective for not complying with Form 2 of the Rules of Court 2012 ('the ROC') which required the writ to be issued with a teste in the name of the Right Honourable Chief Judge of Sabah and Sarawak.

Held, dismissing the striking-out application:

(1) P argued that the error in the writ was curable pursuant to O 1A of the ROC which stated that the court shall have regard to the overriding interests of justice and not only to the technical non-compliance with the Rules. This court agreed that the error in respect of the teste in P's writ was curable as it did not affect the rights of the parties or the merits of the case in any way and it was easily rectified by an amendment to the pleadings (see paras 14 & 16).

(2) P had sufficiently pleaded facts to establish a cause of action for breach of trust or constructive trust. This was not a case of an obvious departure from the pleadings. The escrow fund was the purported trust property and D1 was the purported trustee who owed a fiduciary duty towards P under the escrow agreement (see paras 36 & 50).

(3) The instant case was not a suitable one for striking out. The question of whether or not limitation applied and as to what cause of action was established from the pleaded facts were matters that needed to be ventilated at full trial. In respect of the pleading point, there was no requirement for a claimant to specifically plead the legal term for a cause of action. The parties were not required to plead law. It was sufficient if the claimant had pleaded facts that could establish the intended cause of action (see para 51).

(4) The issue of whether the fourth and fifth defendants were partners of D1 at the material time and were thus liable to P was a serious issue to be tried. The onus was on the said defendants to prove that they were not partners of D1 at the material time given that the fourth defendant's name appeared on D1's letterhead and the fifth defendant was described as the executor of the escrow agreement on behalf of D1 (see para 52).

[Bahasa Malaysia summary

Plaintif ('P'), sebuah syarikat yang diperbadankan di Indonesia, telah kononnya memasuki perjanjian *escrow* dengan defendan pertama ('D1') yang mana P telah dikatakan mendepositkan USD400,000 ke dalam akaun *escrow* yang dibuka oleh D1 untuk tujuan membayar dana kepada benefisiari yang dinamakan dalam perjanjian *escrow*. P berhujah bahawa apabila urus niaga untuk tujuan akaun *escrow* diwujudkan telah dibatalkan, ia meminta pemulangan USD400,000 tetapi D1 gagal membayar balik walaupun tuntutan undang-undang untuk perkara yang sama telah dibuat. Dalam tindakan semasa untuk mendapatkan semula jumlah tersebut, P berhujah bahawa defendan kedua hingga kelima pada setiap masa adalah rakan kongsi D1. Defendan keempat dan kelima ('defendan'), yang menafikan dakwaan P, memohon untuk membatalkan tindakan P atas alasan bahawa kausa tindakan adalah untuk pelanggaran kontrak yang didakwa dan oleh itu disekat oleh had masa di bawah Akta Had Masa 1953 ('AHM'). P, bagaimanapun, berhujah bahawa tiada sekatan masa terpakai kerana tuntutannya adalah untuk mendapatkan semula wang amanah di bawah s 22 AHM, satu pendapat yang disangkal oleh defendan dengan berhujah bahawa P tidak memplidkan kausa tindakan amanah. Defendan juga berhujah bahawa writ P adalah cacat kerana tidak mematuhi Borang 2 Kaedah-Kaedah Mahkamah 2012 ('KKM') yang memerlukan writ itu dikeluarkan dengan teste atas nama Yang Amat Berhormat Ketua Hakim Sabah dan Sarawak.

Diputuskan, menolak permohonan pembatalan:

(1) P berhujah bahawa kecacatan dalam writ itu boleh dipulihkan menurut A 1A KKM yang menyatakan bahawa mahkamah hendaklah mengambil kira kepentingan utama keadilan dan bukan sahaja kepada ketidakpatuhan teknikal terhadap Peraturan. Mahkamah ini bersetuju bahawa kesilapan berkenaan teste dalam writ P boleh dipulihkan kerana ia tidak menjejaskan hak pihak-pihak atau merit kes dalam apa-apa cara dan ia mudah diperbetulkan melalui pindaan kepada pliding (lihat perenggan 14 & 16).

(2) P telah memplidkan fakta yang mencukupi untuk mewujudkan kausa tindakan bagi pecah amanah atau amanah konstruktif. Ini bukanlah satu kes yang jelas lari dari pliding. Dana *escrow* ialah harta amanah yang dikatakan dan D1 ialah pemegang amanah yang dikatakan mempunyai kewajipan fidusiari terhadap P di bawah perjanjian *escrow* (lihat perenggan 36 & 50).

(3) Kes semasa tidak sesuai dibatalkan. Persoalan sama ada had dikenakan atau tidak dan kausa tindakan yang dibuktikan daripada fakta yang diplidkan adalah perkara yang perlu dibicarakan pada perbicaraan penuh. Berkenaan dengan perkara pliding, tidak ada keperluan bagi pihak yang menuntut untuk merayu secara khusus terma undang-undang untuk kausa tindakan. Pihak-pihak tidak dikehendaki untuk memplidkan undang-undang. Ia adalah memadai jika pihak yang menuntut telah mengaku fakta yang boleh membuktikan kausa tindakan yang dimaksudkan (lihat perenggan 51).

(4) Isu sama ada defendan keempat dan kelima adalah rakan kongsi D1 pada masa material dan dengan itu bertanggungjawab kepada P adalah isu yang serius untuk dibicarakan. Beban adalah terhadap defendan tersebut untuk membuktikan bahawa mereka bukan rakan kongsi D1 pada masa yang material memandangkan nama defendan keempat tertera pada kepala surat D1 dan defendan kelima disifatkan sebagai pelaksana perjanjian *escrow* bagi pihak D1 (lihat perenggan 52).]

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam and other appeals [2017] 5 MLJ 800, CA (refd)

Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640; [2013] 7 CLJ 533, FC (refd)

Dollar Valley (M) Sdn Bhd v Rimba Raya Sdn Bhd & Ors [2004] 4 MLJ 6, HC (distd)

Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal [2009] 4 MLJ 149, FC (distd)

Fredolin Penggo v Mohd Rizal Abdullah @ Raymund B Godfrey [2020] MLJU 1097; [2020] 1 LNS 1182, HC (refd)
Lee Teng Siong v Lee Kheng Lian & Ors [2006] 5 MLJ 609, CA (distd)
Lotte Chemical Titan (Malaysia) Sdn Bhd v Siemens Malaysia Sdn Bhd [2021] MLJU 580, HC (folld)
Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener) [2019] 2 MLJ 137; [2019] 2 MLRA 1, FC (distd)
McCurry Restaurant (KL) Sdn Bhd v McDonalds Corporation [2009] 3 MLJ 774, CA (folld)
Omar Suhaimi Abu Hassan v Mahkamah Perusahaan Malaysia & Anor [2014] 3 CLJ 720, CA (refd)
Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal [2015] 6 MLJ 492, FC (distd)
Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (distd)
Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors [2012] 1 MLJ 473, CA (folld)
Tetuan Khana & Co (sued as a firm) v Saling bin Lau Bee Chiang & Ors and other appeals [2019] 3 MLJ 189; [2019] 3 CLJ 1, CA (refd)
Tower Cabinet Co Ltd v Ingram [1949] 1 All ER 1033, KBD (refd)

Legislation referred to

Limitation Act 1953 s 22(1)
Partnership Act 1961 s 38(1)
Rules of Court 2012 O 1A, O 18 r 19, Form 2

Cheah Sin Chin (Sandra Lee) (Azwar) for plaintiff.
Edran Yeo (Ehsan & Yeo) for defendant.

Amelati Parnell JC:

MATERIAL FACTS

[1] The plaintiff is a foreign entity incorporated in Indonesia.

[2] The first defendant is a partnership registered under the Malaysian Bar ('said partnership'). It was contended that said partnership is no longer active as the sole proprietor had passed away on 20 September 2022.

[3] The second to fourth defendants were purportedly partners of said partnership at all material times and the fifth defendant is supposedly the current partner of said partnership. The latter is categorically denied by the fourth and fifth defendants.

[4] The plaintiff purportedly entered into an escrow agreement dated 15

September 2008 with the first defendant ('escrow agreement') for the plaintiff to remit funds into the first defendant's account to be put in an escrow fund for the beneficiary named under said escrow agreement ('escrow fund').

[5] Under the purported escrow agreement, the first defendant is designated as an agent to hold the escrow fund as a stakeholder. Such escrow fund must be held, invested, and released only in accordance with the escrow agreement. As the plaintiff's purported agent, the first defendant is not entitled to use the escrow fund.

[6] The plaintiff had purportedly deposited the sum of USD100,000 and USD300,000 into the escrow fund on the 24 December 2008 and 29 December 2008 respectively.

[7] The escrow fund was purportedly not utilised and the transaction pursuant to the escrow agreement was purportedly aborted.

[8] The plaintiff purportedly demanded the return of the deposited sum of USD400,000 through its solicitors' letters of 26 August 2009 and 12 October 2011. It was contended that the first defendant had refused, failed and omitted to do so.

[9] The plaintiff initiated the present action. The fourth and fifth defendant then applied to strike out the plaintiff's action on the grounds, inter alia, that the plaintiff's claim is time-barred ('defendants' striking out application').

[10] The plaintiff contends that its claim is premised on trust and as such, there is no limitation period.

[11] The fourth and fifth defendants argued that the cause of action in trust was never pleaded.

[12] For convenience and ease of reference, the fourth and fifth defendants will be referred to as 'defendants' for the purpose of the present application unless the context requires specific reference to each of the defendants since the fourth and fifth defendants are the only defendants involved in the defendants' striking out application.

PRELIMINARY OBJECTION

[13] The defendants argue that the amended writ is defective as it is not issued in accordance with Form 2 of the Rules of Court 2012 which requires

the writ to be issued with a teste in the name of the Right Honourable Chief Judge of Sabah and Sarawak. A

[14] The plaintiff argues that the error is curable pursuant to O 1A of the Rules of Court 2012 which states that the court shall have regard to the overriding interest of justice and not only to the technical non-compliance with the Rules. B

[15] A substantially similar issue was brought before the High Court in *Fredolin Penggo v Mohd Rizal Abdullah @ Raymund B Godfrey* [2020] MLJU 1097; [2020] 1 LNS 1182 although in respect of an alleged failure to include the teste in a writ filed in the sessions court. The High Court found that there was no such requirement in respect of writs filed in the sessions court. It was further held that an error in respect of the teste is so minor, technical, does not prejudice the other party and is curable by O 1A of the Rules of Court 2012. I am in full agreement with the views expressed by the High Court. C D

[16] As such, the error in respect of the teste in the present case is curable as it does not affect the rights of parties or the merits of the case in any way and it is easily rectified by an amendment to the pleadings. E

[17] On that note, the following decisions cited by the defendants are easily distinguishable.

[18] The Federal Court decision in *Malayan Banking Bhd v Gan Bee San & Ors and another appeal (SKS Foam (M) Sdn Bhd, intervener)* [2019] 2 MLJ 137; [2019] 2 MLRA 1 (FC) ought to be distinguished as that case concerns a rule in respect of the power to issue winding up orders and not mere formalities that are curable. It was obvious in that case that the rule in question expressly required a winding up petition to be heard by a judge in open court as only a judge has jurisdiction to issue a winding up order. The breach of such rule clearly affected the rights of parties. F G

[19] Similarly, the decision in *Dollar Valley (M) Sdn Bhd v Rimba Raya Sdn Bhd & Ors* [2004] 4 MLJ 6 cited by the defendants is distinguishable as that case involves a rule designed to prevent a party from being deprived of its right to be heard. In that case, the proper party was not named as the putative respondent nor served with the notice of appeal. Instead, the wrong parties were brought in. The non-compliance affected the rights of parties. H I

[20] Briefly, the decision in *Lee Teng Siong v Lee Kheng Lian & Ors* [2006] 5 MLJ 609 is distinguishable as it involves the wrong mode to move the court for summary determination.

[21] The same goes for the Court of Appeal decision in *Omar Suhaimi Abu Hassan v Mahkamah Perusahaan Malaysia & Anor* [2014] 3 CLJ 720 where the error in the originating application for judicial review was the failure to include a prayer for leave. This is inconsistent with the judicial review regime which is a two-stage process consisting of the ex parte leave stage involving only the applicant and the Attorney General's Chambers and the substantive hearing involving the applicant and all putative respondents. There is no issue of wrongly employing a mode of originating process in the present case.

[22] The Federal Court's decision in *Duli Yang Amat Mulia Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj Tunku Mahkota Johor v Datuk Captain Hamzah bin Mohd Noor and another appeal* [2009] 4 MLJ 149 held that intentional disregard of the rules is not curable. Based on the analysis of His Lordship Zaki Azmi CJ (as he then was), it appears that the 'intentional disregard' contemplated by the Federal Court must be demonstrated by a clear abuse of the rules.

[23] In that case, the respondent knew that he had to serve the writs issued by the Shah Alam Court and the Kuala Lumpur Court within a specified period but he chose to keep them in abeyance because the writs were supposedly meant to be 'protective writs' to prevent limitation from setting in.

[24] The respondent later renewed the writs but did so only after they have expired. Even more astonishing is the blatant admission that the respondent never attempted to serve the writs until after they were renewed ex parte for the first time but only the writ issued by the Shah Alam Court was served. It was evident that the respondent had abused the rules by withholding service and relying on the false notion that the writs may be renewed ad infinitum just to keep them hanging over the appellant as a looming threat. Those were the facts emphasised by the Federal Court to be the basis of its decision. That decision is therefore clearly distinguishable as there is no intentional disregard of the rules in the present case.

GENERAL PRINCIPLES IN STRIKING OUT APPLICATIONS

[25] Order 18 r 19 of the Rules of Court 2012 states:

> (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that-
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> (a) it discloses no reasonable cause of action or defence, as the case may be;
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> (b) it is scandalous, frivolous or vexatious;
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> (c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the Court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subparagraph (1)(a).

(3) This rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

[26] The law on striking out pleadings is well settled and the Malaysian jurisprudence is replete with authorities on the point. It is sufficient to refer to a few landmark decisions for the purpose of determining the present application.

[27] In *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36, the Supreme Court laid down the following test at 43G:

> It is only in plain and obvious cases that recourse should be had to the summary process under this rule ... and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable'. It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence ... The authorities further show that if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument ...The court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.

[28] The Court of Appeal in *Datin Paduka Phang Oi Choo @ Phang Ai Tu v Tan Sri Datuk G Gnanalingam and other appeals* [2017] 5 MLJ 800 also said that if a triable issue is raised, the matter must go to trial. The following was observed at para 19:

> It is trite that even if a single triable issue is raised and shown to be existed, the action should proceed to trial. The action should not be summarily disposed. Also the mere fact that the case is weak and not likely to succeed at the proper trial is no ground for the pleadings to be struck out.

[29] The following passage in the Court of Appeal's decision in *Sivarasa Rasiah & Ors v Che Hamzah Che Ismail & Ors* [2012] 1 MLJ 473 at para 15 is also instructive:

> A striking out order should not be made summarily by the court if there is issue of law that requires lengthy argument and mature consideration. It should also not be made if there is issue of fact that is capable of resolution only after taking viva voce evidence during trial ... If one has to go into a lengthy and mature consideration in

detail of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily.

[30] Having referred to authorities on the general principles, I now turn to the contentions of the parties.

ALLEGATION OF TIME-BAR

[31] The defendants contend that the plaintiff's claim is premised on a breach of contract, and as such, it is caught by the general limitation period of six years from the date the cause of action is accrued.

[32] On the other hand, the plaintiff contends that its action is founded on trust as the monies were purportedly held by the first defendant as stakeholder. Hence, there is no limitation period pursuant to sub-s 22(1) of the Limitation Act 1953 which states:

> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
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> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
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> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.

[33] The defendants argued that the plaintiff never pleaded trust as a cause of action.

[34] In response, the plaintiff submitted that it had pleaded facts to establish the elements of trust.

[35] On the point of pleading, the Court of Appeal's decision in *McCurry Restaurant (KL) Sdn Bhd v McDonalds Corporation* [2009] 3 MLJ 774 ('McCurry') is instructive. In that case, the defendant argued that the plaintiff never pleaded the extended form of tort on which it succeeded in the court below. His Lordship Gopal Sri Ram JCA (as he then was) said this at para 11:

> ... And, as for the pleading point, there is really nothing in it at all. In the first place the plaintiff has in its statement of claim pleaded all the facts that go to constitute the elements of the tort. In the second place, whether the plaintiff may rely on the so called extended form of the tort is a question of law and it is well settled that you do not have to plead law.

[36] It is obvious from that the facts capable of establishing the elements of

trust or constructive trust were pleaded in the plaintiff's statement of claim. The escrow funds were the purported trust property, the first defendant was the purported trustee, and the first defendant purportedly held a fiduciary duty towards the plaintiff under the escrow agreement. The Federal Court in *Datuk M Kayveas & Anor v Bar Council* [2013] 7 CLJ 533 clearly expressed at para 31 that '... solicitors who hold funds which are paid to them as stakeholders hold those funds as trustees ...'.

[37] If the defendants argued that the word 'trust' was never pleaded, the same can be said for 'breach of contract' which was never specifically mentioned in the statement of claim. If there is a strict rule that says that a claimant must specifically plead the legal term for a particular cause of action, then the defendants are going under an unfounded assumption since they insist that the plaintiff had pleaded breach of contract even though it was never expressly mentioned. As demonstrated by the Court of Appeal in *McCurry*, there is no such rule.

[38] Having said that, the Court of Appeal's decision in *Tetuan Khana & Co (sued as a firm) v Saling bin Lau Bee Chiang & Ors and other appeals* [2019] 3 MLJ 189; [2019] 3 CLJ 1 ('Tetuan Khana') found that actions for breach of trust and constructive trust which resulted in misuse, mismanagement and misappropriation of trust funds is not barred by limitation pursuant to sub-s 22(1) of the Limitation Act 1953. The Court of Appeal further found that 'as long as the audited accounts are not rendered to the [settlor], it is a continuing cause of action ... which survives the limitation of six years'. I will further observe that the claim in *Tetuan Khana* went to full trial in order to ventilate the issues of time-bar.

[39] Even if there is a possibility that the cause of action is for a breach of contract, and not breach of trust, this must be considered at a full trial. The question of whether or not the pleaded facts will establish either causes of action propounded by the plaintiff and the defendants, respectively, is both a question of fact and law.

[40] The most prudent approach is to determine the issues at a full trial. This approach was similarly taken by the High Court in *Lotte Chemical Titan (Malaysia) Sdn Bhd v Siemens Malaysia Sdn Bhd* [2021] MLJU 580 where there were disputes as to whether the cause of action is for breach of contract or for negligence that was only discoverable after the purported breach. Since the calculation of when limitation should set in depends on what is the actual cause of action, the High Court found that the matter needs to go to full trial. The following passage is instructive:

> [32] From the pleadings of the case and arguments put forth by the counsels for both the plaintiff and the defendant, this court is of the view that there are triable

issues pertaining to limitation and accrual of cause of action namely; when does the breach occur that gives rise to the plaintiff the right to sue the defendant? Following which, when does limitation set in?

[33] Obviously this case is not an appropriate case for the plaintiff's claim to be struck out summarily as the issue of limitation can only be determined after viva voce evidence where witnesses need to be called.

[34] The parties have contended two extremities and insist that both extremities bear with them supporting yet contrasting evidence. And the fact that the subject matter in and of itself required the input and opinion by a technical expert (being Eastham), it is sublimely telling that the issue at hand involves technical and complex issues which cannot be determined merely via affidavit evidence. The true extent and time of discoverability of the alleged breach can only be judiciously determined and appreciated vide viva voce evidence in a full trial.

[35] Furthermore, this court is also minded that the very essence of the alleged breach is also disputed by the defendant. Thus, apart from the issue of Limitation, there are also disputations against the allegation of breach in and of itself, which is also an integral question of fact and evidence. This is not a case where the issue and existence of breach is conceded. Thus, integral to the ascertainment of the time or accrual of the cause of action is the determination of whether or not there exists a breach of contract in the first place. For this court to determine the present technical and complex disputes at this summary juncture is far too presumptuous.

[41] The present claim must also be determined at full trial given the conflicting contentions in respect of not only the issue of limitation but also on what cause of action would be established from the pleaded facts.

[42] Therefore, it is not a suitable case for striking out.

THE DEFENDANTS' STATUS AS PARTNER

[43] This is plainly a serious issue to be tried as can be seen from the contemporaneous documents.

[44] The plaintiff contends that the fourth sefendant had held himself out as a partner of said partnership. In this regard, I find it appropriate to refer to sub-s 38(1) of the Partnership Act 1961 which states:

(1) Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change.

[45] The term 'apparent member' was explained in *Tower Cabinet Co Ltd v Ingram* [1949] 1 All ER 1033 at p 1037 as follows:

The point depends, in my view, on what is the meaning in sub-s (1) of 'apparent

> members.' Apparent to whom? Does it mean apparent to the whole world, or notorious, or does it mean apparent to the particular person with whom the section is dealing? In my reading of that sub-section, 'apparent members' means persons who appear to be members to the person who is dealing with the firm, and they may be apparent either by the fact that the customer has had dealings with them before, or because of the use of their names on the notepaper, or from some sign outside the door, or because the customer has had some indirect information about them. Both sub-s (1) and sub-s (2), in my view, deal with cases where they are apparent members.

[46] Surely the plaintiff is entitled to treat the fourth defendant as an apparent member of said partnership given that the latter's name appears on said partnership's letterhead. The burden of proving that he is not a partner falls on the fourth defendant.

[47] With regard to the fifth defendant, it appears that the fifth defendant was the executor of the escrow agreement on behalf of the first defendant as can be seen in exh RF2 of the plaintiff's affidavit in encl 19. This was not seriously disputed. It was only submitted that the fifth defendant had ceased practice in the first defendant since 2010 and had no knowledge of the dealings. The burden is obviously on the fifth defendant to prove the cessation in order for the fifth defendant to avoid liability.

[48] Hence, whether or not they were partners of said partnership at the material time and whether or not they are liable to the plaintiff are questions that ought to be ventilated at a full trial.

OTHER AUTHORITIES CITED

[49] Before concluding, it would be prudent to address the cases cited by the defendants in respect of the pleading point. The decision in *Saiman bin Umar v Lembaga Pertubuhan Peladang and another appeal* [2015] 6 MLJ 492 ('Saiman') and *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1 ('Samuel Naik') are compelling authorities on proper and sufficient pleading. Although, I must say that they are distinguishable. In both cases, there were obvious departures from the pleaded case in the claimants' submissions at the appeal stage. For completeness, I will reproduce the excerpts containing the basis of the decisions made in both cases. The following excerpts are taken from paras 38 and 50 of Saiman:

> [38] He pointed out that the plaintiff's pleaded claim was that the defendant had breached reg 28(4) of the disciplinary rules when it failed to establish an investigation committee for the purpose of obtaining further clarification by way of examining witnesses. To put the point differently, the plaintiff's pleaded case was about the nonapplication of reg 28 of the disciplinary rules, whereas the plaintiff's position before this court was that an investigation committee under reg 28 was

established and that he was not called upon to attend it.

> [50] ...The fact that the defendant pleaded in that fashion did not alter the fact that the plaintiff's pleaded case was his dissatisfaction with the non-formation of the investigation committee. Now, before this court, the plaintiff was trying to argue something quite different from his pleaded case without even the support of evidence. But as we have said earlier, the law is trite that the court should not decide an issue, which was not pleaded by the parties.

Whereas, the following excerpts are taken from paras 27 and 28 of *Samuel Naik*:

> [27] ... Being an agreed issue, this point of MPM being a registered owner was not raised at all by either party at the High Court as well as at the Court of Appeal or even at the stage of the main submissions of the present appeal before us. Neither was it mentioned in the written submissions by both counsel filed before us. It was only during submission-in-reply before us that the co-counsel for the appellant, Mr Gobind Singh Deo raised this new issue by drawing our attention to Borang 11A (Suratan Hak Milik Sementara), Kanun Tanah Negara in respect of the land in question (at pp 107–109 of the Rekod Rayuan Jld 2), where he claimed that there was an endorsement to show that at the time when the respective sale and purchase agreements were executed between MPM and the earlier purchasers between 10 October 2001 and 21 January 2002, MPM was not the registered proprietor/owner of the land and thus had no right to deal with it, as the land had earlier been surrendered and vested in the state authority on 3 September 2000. Therefore counsel claimed that the sale and purchase agreements as well as the deeds of assignments executed by the earlier purchasers were void and invalid.
>
> [28] This is totally a new issue raised by the appellant's co-counsel before us at the submission-in-reply stage. It was not pleaded at all. It went against the pleaded case of the appellant himself (as well as the respondent) that at the material times, MPM was the registered proprietor/owner of the land and that the existence of the sale and purchase agreements with the earlier purchasers, the deeds of assignment in favour of the respondent as well as the letters of undertaking issued by MPM and BMP in favour of the respondent were not disputed at all. Clearly, the respondent was caught by surprise.

[50] As alluded to above, the plaintiff has sufficiently pleaded facts to establish a cause of action in breach of trust or constructive trust. This is not a case of an obvious departure from pleadings. As such, the defendants' reliance on *Saiman* and *Samuel Naik* is misplaced.

CONCLUSION

[51] This is a not a suitable case for striking out. The issues in respect of limitation and on what cause of action is established from the pleaded facts are matters that need to be ventilated at full trial. In respect of the pleading point, there is no requirement for a claimant to specifically plead the term for a cause

of action. It is sufficient for the claimant to plead facts that can establish the intended cause of action. It is not for the parties to plead law.

[52] Clearly, the issue of whether the fourth and fifth defendants were partners of said partnership at the material time is a serious issue to be tried. The fourth defendant is an apparent member of the first defendant as his name clearly appears on the letterhead. The law states that a person is entitled to treat apparent members as members of the partnership. The onus is on the fourth defendant to show otherwise. Similarly, the burden is on the fifth defendant to prove that she had ceased from being a partner in said partnership at the material time given that her name conspicuously appears as the executor of the escrow agreement on behalf of the first defendant.

[53] For the abovesaid reasons, the fourth and fifth defendants' striking out application is dismissed with costs of RM5,000 subject to allocator.

Striking out application dismissed.

Reported by Ashok Kumar